

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 58 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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KESHAVLAL AMRATLAL JHAVERI DECD. THRO' HEIRS AND L.R.

Versus

GHANSHYAMBHAI GORDHANBHAI PATEL

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Appearance:

NANAVATI ASSOCIATES for Petitioners

MR AS VAKIL for Respondents

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 14/03/97

ORAL JUDGEMENT

Rule. Service of Rule waived by Mr.A.S.Vakil,  
learned Advocate for the respondents.

2. This Revision Application, under Section 115 of the Code of Civil Procedure, arises from the order passed by the learned Judge of the City Civil Court (Court No.20) on 6th December 1996, below Ex.1, in Execution Application No. 864 of 1982 filed by the respondents for

executing the Decree for specific performance of the contract in respect of the suit property. The learned Counsel appearing on behalf of the petitioners - judgment debtors, have brought to the notice of the court the following brief particulars of the dates in order to make his submissions arising from the provision contained in Section 28 of the Specific Relief Act, 1963 (for short "the Act").

On 31.8.1982 the Decree sought to be executed was passed and the same contained the condition for payment of balance consideration within one month from the date of the decree. On 30.9.1982 the Bank draft was deposited by the decree holder in the Court. It appears that on 29th September 1982 the judgment debtors applied for the stay of the decree before the trial Court in order to enable them to move the Appellate Court against the original decree. The learned Counsel appearing on behalf of the decree holder made an endorsement that the decree holders went to deposit the amount of the decree but as the account was closed the amount was not accepted by the concerned department. In the mean time on 30.9.1982 the amount was deposited by the bank draft in the Court. However, the same stood credited in the Court account on 8.10.1982 upon the draft having been cleared for payment. Thereafter the First Appeal No.3/83 was filed before this Court by the original defendant and as per the order dated 7.1.1983 the execution proceedings were stayed. As a result of the said proceeding the decree holder moved an application before this Court for withdrawing the amount without prejudice to the rights and contentions of the parties and this Court by an order dated 4.5.1983 granted liberty to withdraw the deposited amount without prejudice to the rights and contentions about the readiness and willingness to perform the contract. On 7.12.1993 the First Appeal was dismissed. On 8.12.1993 the Judgment was received. Ultimately on 18.10.1996 the cheque was deposited in the trial Court by way of compliance of the decree stipulating the condition for payment.

3. From the aforesaid dates Mr.K.S.Nanavati, learned Counsel appearing for the petitioners pressed into service the provision contained in Section 28 of the Act and submitted that there has been a clear default committed by the decree holder in complying with the decree in so far as the same related to condition for payment of the balance consideration within one month from the date of the decree. The learned Judge dealing with the execution proceeding has inter alia considered the fact that the original record had been missing from

14.3.1996 and the order for reconstruction of the record was made. It has further been submitted by Mr.A.S.Vakil, learned Counsel appearing for the decree holder from the order of the executing court that Civil Application No.1951/94 in First Appeal No.714/83 came to be preferred by the Judgment debtors for modification of the decree by adding the cheque amount of Rs.8002/-. The initial order for placing the said application before the Division Bench of this Court was made on 21.10.1994. However, whatever may be the out come of the said application the decree holder deposited the amount which included the aforesaid amount of Rs.8002/-.

4. In the back-ground of the aforesaid set of facts the submissions of Mr.Nanavati may now be considered. Section 28 of the Act would read as under :

"28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed - (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court -

(a) shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of

possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely -

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

On a plain reading of the aforesaid provision it can be seen that the proceeding which has been referred to in the said provision is the suit proceeding and not the execution proceeding. Mr. Nanavati, however, referred to a decision of the Calcutta High Court in the case of Pankoj Kumar Bhattacharjee V/s. Manmatha Nath Vidyabhushan Bhattacharjee, reported in AIR 1973 Calcutta 439. On going through the facts of the case before the Calcutta High Court it does appear that the question with regard to rescission of the decree for specific performance of contract did not arise in an execution proceeding. There the individual application was moved under Section 28 of the Act inter-alia praying for appropriate orders on the ground that the decree for

specific performance became infructuous. It might be noted that the Calcutta High Court has clearly observed from Section 35(c) of the Act as it stood prior to the Act of 1963 that where the decree specifically provides for payment of the balance of the purchase money within certain time, it is not open to the decree-holder to come at any time to pay the money and ask for the enforcement of the decree. No question of payment within reasonable time arises in such case and that the Court may, however, extend the time taking into consideration the attitude of the decree-holder. The Court, therefore, held that where the decree-holder has not made any application for enlargement of time at any stage of the proceeding for rescission, the order rescinding the contract and decree for specific performance is justified. This decision, in my opinion, will not help the petitioners herein.

5. Mr.Nanavati, placed reliance also upon a decision of the Bombay High Court in the case of Bhujangrao Ganpati V/s. Sheshrao Rajaram, reported in AIR 1974 Bombay 104. The question before the learned Single Judge of the Bombay High Court was with regard to extension of time under Section 28 of the Act. There the Decree provided that the Suit was to stand dismissed if the payment was not made within the time fixed. Considering such clause in the decree itself the Bombay High Court held that the Decree was a self operative final decree and the provision of Section 28 of the Act would not apply so as to grant extension of time. This decision would also not be applicable to the present case.

6. The question which has been canvassed by Mr.Nanavati is that the provision of Section 28 could be invoked even in an execution proceeding. The question would no longer be res-integra in view of the decision of the Honourable Supreme Court in the case of Ramankutty Guptan V/s. Avara, reported in AIR 1994 SC 1699. The observations head-noted from Para : 7 might be reproduced as the same would answer the question raised :

"Where the question is whether application under S.28(1) for rescission of contract, specific performance of which had been decreed should be on the original side or execution side and section indicates that it should be "in the same suit." It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains control over the decree even after the decree has

been passed. It is open to the Court to exercise the power under S.28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Therefore, where the execution application has been filed in the same Court in which the original suit was filed, namely, the Court of first instance, instead of treating the application for rescission on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law."

In so far as present case is concerned, no application for rescission has at all been preferred.

7. There is no other submission which has been made against the impugned order in the execution proceeding.

8. In above view of the matter this petition cannot be entertained. Rule is, therefore, discharged. No order as to costs.

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